

Ontario Introduces its Estate Information Return

Ontario's probate process is governed by the Estate Administration Tax Act, 1998 ("EATA"). In 2011 Ontario enacted significant changes to the legislation, transferring the administration of this tax to the Minister of Revenue. However, only in December 2014 did Ontario file the long-awaited regulations dealing with the new information requirements for estates.

With these regulations in place, Ontario released its Estate Information Return, which executors will be required to file for estates for which an application for probate had not been submitted prior to January 1, 2015. There is little doubt that estate bypass has become very attractive, as the information required in the new filing (and of course the probate fees and other costs associated with the estate) relates to only the assets forming part of the estate for which the certificate of appointment of estate trustee (or similar certificate) is being sought.

Probate fees, more recently referred to as estate administration taxes, are levied under the EATA. These taxes are paid when an "estate representative" (including an executor or administrator of an estate, an estate trustee, etc.) receives a court order certifying that the will

of the deceased is valid and that the estate representative has the legal authority to administer the estate.

We have gone from what was largely an honour system to one with considerably enhanced administration and compliance. The duties of many executors, especially those for more complex estates, have become more onerous. Some heirs may have to wait longer to receive their final distribution from an estate than was previously the case.

Probate fees levied under the EATA are unchanged: \$5 per \$1,000 for the first \$50,000 of assets falling into an estate, and \$15 per \$1,000 for assets in excess of \$50,000. However, one can anticipate that with the enhanced compliance measures the fees collected by the Ontario government will increase.

With appropriate planning, and a designated beneficiary, assets can pass outside the estate. Insurance policies include segregated fund contracts, life insurance policies, insurance company Guaranteed Interest Contracts (GICs) and annuity policies (including life and term certain policies).

Other strategies exist for avoiding the fees, including the use of alter ego or joint partner trusts, joint tenancy with the right of survivorship (JTWROS),

etc. Each situation needs to be reviewed before the appropriate strategy is implemented, as the full implications need to be assessed. For example, a transfer of assets into JTWROS may have income tax implications (possible disposition for tax purposes, possible application of attribution rules, etc.). Other implications, including loss of control, exposing assets to the debts of the other party, etc. need to be considered as well.

CASE STUDY:

John anticipates that at the time of his death, he will have \$1 million in assets. His house will be worth \$450,000. He will have another \$550,000 in investments (currently a Guaranteed Investment Certificate (GIC) held at a bank.) He is considering acquiring an insurance company GIC or conservative Segregated Fund contract issued by an insurer. Looking at these two scenarios, see the difference in how probate fees are calculated:

	ESTATE SUBJECT TO PROBATE (\$)	
Anticipated holdings at death		
House	450,000	450,000
GIC held at a bank	550,000	
Term fund (or segregated fund contract) issued by an insurer having a named beneficiary		550,000
	1,000,000	1,000,000
Estate subject to probate	1,000,000	450,000
Probate fees		
First \$50,000 (\$5 per \$1,000)	250	250
Remainder (\$15 per \$1,000)	14,250	6,000
Total	14,500	6,250
Savings achieved by estate bypass	0	8,250

For illustration purposes only

Under the regulations to the EATA, the Minister of Finance will be seeking a significant amount of data, including “a complete list of the assets of the deceased person used to determine the value of the estate”. The assets falling into the estate governed by the will that is being probated will be disclosed on Ontario’s new Estate Information Return, which is to be filed with the (Ontario) Minister of Finance.

The new return is due no later than 90 days after an estate certificate is issued to the estate representative. Since this new information return is required where the application for probate had not been made before January 1, 2015, it is entirely possible that executors of estates arising from deaths occurring late in 2014 may be unaware of this new obligation.

This filing will be cross-referenced to the application for probate made by the estate representative. As is indicated on the Ministry’s web-site, “estate representatives should be able to substantiate asset valuations”. There is the suggestion that professional valuers be engaged for assets where a valuation may be complicated.

For assets falling into the estate (including contracts of insurance without a named beneficiary), a full description of the asset will be required, including the name of the deceased person’s advisor, dealer,

financial institution or other person holding the assets on behalf of the deceased, as well as account numbers if applicable.

In looking at the Guide accompanying the new return, we can read that there is no need to include “property that the deceased owned as a ‘joint tenant’ with right of survivorship with other parties”. However, in text appearing on the same page of the Guide, we are reminded “to include all property in which the deceased had a beneficial interest, even if the deceased did not hold legal title and legal title was held in another person’s name”. In reading these two phrases together, there may be circumstances in which estate trustees may want to confer with legal counsel when deciding whether certain assets that the deceased had transferred to JTWROS should be included in the filing. The return has just been released. Given the amount of time that could elapse between the date of death and the actually filing deadline for the new return, we do not yet have the benefit of knowing what Ontario’s audit practices will be in this area.

The new legislation contemplates a four year period for possible audit. There are no time limits when there is a failure to comply, fraud or misrepresentation. New provisions provide for fines and imprisonment for certain types of non-compliance.



There is no doubt that once the new return is filed, the Minister will be able to make a more informed decisions about which estates to audit. Here we need to bear in mind that there is much more at issue than the probate fees. The legislation provides that the Minister of Revenue may share the information with other employees of the Crown for many purposes, including “for the use in the administration or enforcement of an Act that imposes a tax or confers a benefit”. Income tax implications such as capital gains calculations come to mind, as do benefit programs such as Ontario’s Ontario Disability Support Program.

On the topic of clearance certificates, we note that the EATA legislation currently does not contain a mechanism whereby the estate representative could obtain a clearance certificate for probate fees. Given the potential for audits, and challenges as to the valuation of assets, we expect that estate representatives may well hesitate to distribute the last of the assets of the estate until the audit period has elapsed.

It is clear that the estate representative’s duties have become considerably more complex. And as stated above, given the ability for the information to be exchanged by the various taxation and other authorities, estate representatives will have to be extremely diligent when making an application for probate, and later completing the information return for the Minister of Revenue.

Advisors should be reviewing estate plans put in place for their clients. Estate bypass using insurance products having named beneficiaries provides significant benefits:

- Avoiding delays associated with settling the estate;
- Savings in probate fees and associated costs relating to administering the estate;
- Enhancing confidentiality, and;
- Potential creditor protection.



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